UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL DOKTOREZTK, Plaintiff, v. S. MORALES, ET AL., Defendants.	Civil No. 09-CV-1288-JM(WVG) **REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** [DOC. NO. 28]

Pending before the Court is Defendant S. Morales's Motion for Summary Judgment. (Doc. No. 28.) Defendant claims qualified immunity from suit and argues that he did not violate Plaintiff's Eighth Amendment rights because he did not display deliberate indifference for Plaintiff's safety. The undersigned RECOMMENDS that Defendant's motion be DENIED.

I. FACTUAL BACKGROUND[1/]

In August 2007, Plaintiff was a state prisoner incarcerated at R. J. Donovan State Prison ("RJD") in San Diego, California. On August 27, 2007, plaintiff was escorted from his housing unit to the

[1/] The factual background is largely adapted from Defendant's motion. Much of the facts are not disputed. Where facts are disputed, the undersigned will state so.

Triage Treatment Area ("TTA") for a medical appointment. (Doc. No. 28-4 at 16.)[2/] The TTA building is a facility where licensed physicians provide medical care to inmates, and contains offices, treatment rooms, restrooms, and a holding cell. (Id. at 33-34.)

Plaintiff was placed in the TTA holding cell while he waited to be examined. (Id. at 17.) Plaintiff shared the holding cell with several other inmates from the Sensitive Needs Yard ("SNY"). (Id. at 18.) Plaintiff was an SNY inmate. (Id. at 15.) Inmates are assigned to the SNY if they have serious safety concerns. (Id. at 34.) Such inmates include those convicted of sex crimes against children, those who have dropped out of gangs, and other inmates with special security needs. (Id.) SNY inmates are housed separately from the vast majority of the prison's inmates, who do not have the same serious security needs and can be housed in "general population." Various general population inmates were also waiting for treatment and were seated on a bench, which was approximately ten feet from the holding cell. (Id. at 18-19, 33.)

Defendant Morales was a correctional officer assigned to the TTA and was supervising inmates as they waited to be treated by the physician. (Id. at 32.) In 2007, Defendant had been a Correctional Officer for approximately 21 years. (Id.)

The TTA holding cell was approximately seven by five feet, with benches inside, but no restroom. (Id. at 33.) The SNY inmates had been waiting in the cell for approximately 90 minutes, and several of them requested permission to use the restroom. (Id. at

---

[2/] All page numbers refer to the Court Clerk's numbering of the document when filed, not the document's native pagination.

33.) Defendant Morales granted their requests and allowed them to use the restroom one at a time. (Id.)

In order for the SNY inmates to use the restroom, they had to be let out of the holding cell and walk past the general population inmates who were seated on benches. (Id. at 20-21, 33.) Defendant escorted the SNY inmates individually and stood near the entrance to the restroom while they were inside. (Id. at 33.) Defendant avers that approximately five SNY inmates used the restroom without incident before Plaintiff did so. (Id.) However, Plaintiff believes he was the third SNY inmate to use the restroom. (Id. at 20.) Plaintiff requested to be let out of the holding cell to use the restroom, but did not state he had any reservations about being let out of the cell. (Id. at 21, 33.) Moreover, Plaintiff did not request that the inmates from other units be cleared from the path until he was secured. (Id.) Nor did Plaintiff state that he had any safety concerns, either due to his classification as an SNY inmate, or because of an enemy situation or prior conflict with any of the general population inmates. (Id. at 33.)

As Plaintiff passed the general population inmates, they used derogatory language toward him. (Id. at 22.) However, Defendant avers he did not hear the general population inmates make the derogatory comments. (Id. at 33.) Defendant stood near the door to the restroom while Plaintiff was inside. (Id. at 23.)

Almost immediately after Plaintiff walked out of the restroom, an inmate (later identified as Morales) stood up, yelled profanities at Plaintiff, and began hitting him with a wooden

crutch. (Id. at 23-24, 33-34.) Another inmate (later identified as Buenrosto) hit plaintiff with his fists in the head and torso area. (Id. at 24, 34.)

Defendant was a few feet away from where the assault transpired, and he immediately responded by activating his personal alarm device and repeatedly ordering the inmates to stop, which they ignored. (Id. at 24-25, 34.)

Defendant then unholstered his pepper spray and sprayed a two to three-second burst into the facial areas of inmates Morales and Buenrosto. (Id. at 25-26, 34.) Simultaneously, another correctional officer sprayed inmate Morales in the face with a two-second burst of pepper spray. (Id. at 34.) As soon as the inmates were sprayed, they stopped and got down prone on the floor. (Id.) Defendant maintained custody of the involved inmates until responding staff arrived and escorted them out of the area. (Id.)

As Plaintiff recounted in his deposition, the entire incident lasted approximately 10 to 20 seconds. (Id. at 25.) Plaintiff had never met, or even seen, either of his attackers before the day of the attack. (Id. at 26.)

II. LEGAL STANDARD

Federal Rule of Civil Procedure 56(a) mandates the grant of summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The standard for granting a motion for summary judgment is essentially the same as for the granting of a directed verdict. Judgment must be entered "if, under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51

(1986). However, "[i]f reasonable minds could differ," judgment should not be entered in favor of the moving party. Id.; see also Blankenhorn v. City of Orange, 485 F.3d 463, 470 (9th Cir. 2007) ("If a rational trier of fact might resolve the issue in favor of the nonmoving party, summary judgment must be denied.") (alteration omitted).

The parties bear the same substantive burden of proof as would apply at a trial on the merits, including plaintiff's burden to establish any element essential to his case. Anderson, 477 U.S. at 252; Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Lack of a genuine issue of material fact on a single element of a claim for relief is sufficient to warrant summary judgment on that claim. Celotex Corp., 477 U.S. at 322-23.

The moving party bears the initial burden of identifying the elements of the claim in the pleadings, or other evidence, and "'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Id. at 325; see also Fed. R. Civ. P. 56(c). "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." S.E.C. v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th Cir. 1982).

The burden then shifts to the nonmoving party to establish, beyond the pleadings, that there is a genuine dispute for trial. Celotex Corp., 477 U.S. at 324. To successfully rebut a properly supported motion for summary judgment, the nonmoving party "must point to some facts in the record that demonstrate a genuine issue of material fact and, with all reasonable inferences made in the

plaintiff[]'s favor, could convince a reasonable jury to find for the plaintiff[]." Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 738 (9th Cir. 2000) (citing Rule 56; Celotex Corp., 477 U.S. at 323; Anderson, 477 U.S. at 249).

"When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Scott v. Harris, 550 U.S. 327, 380 (2007).

III. DISCUSSION

A. A Genuine Dispute Exists Whether Defendant Acted With Deliberate Indifference Toward Plaintiff's Safety

The key issue is whether Defendant acted with deliberate indifference toward Plaintiff's safety when he walked Plaintiff past a bench that seated two general population prisoners. Defendant argues he did not so act because Plaintiff did not alert him of any safety concerns, did not express discomfort with walking past the general population inmates, Defendant was not aware of any specific threats against Plaintiff, and Defendant had walked several other inmates past the same bench without incident shortly before Plaintiff was assaulted. Plaintiff counters that the mere fact that he was an SNY inmate put Defendant on notice that he was at high risk of being assaulted, and that Defendant was deliberately indifferent to this high risk and, as a result, Plaintiff's safety.

1. Legal Background

"'Prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners.'" Farmer v. Brennan, 511 U.S. 825, 833 (1994) (quoting Cortes-Quinones v.

Jimenez-Nettleship, 842 F.2d 556, 558 (1st Cir. 1988)). The failure of prison officials to protect inmates from attacks by other inmates may rise to the level of an Eighth Amendment violation when: (1) the deprivation alleged is "objectively, sufficiently serious" and (2) the prison officials had a "sufficiently culpable state of mind," acting with deliberate indifference. Id. at 834 (internal quotations omitted). In the seminal Farmer case, the United States Supreme Court for the first time defined the precise contours the mental state required for deliberate indifference purposes.

Farmer was a male transsexual who "wore women's clothing . . . , underwent estrogen therapy, received silicone breast implants," and generally projected feminine characteristics. Id. at 829. Farmer was initially housed in administrative segregation but was reassigned to the federal prison's general population without any objection from him. Id. at 830. Within two weeks, Farmer's cell-mate beat and raped him, and he was returned to administrative segregation. Id.

Farmer sued various prison officials, alleging that the officials (1) placed him in the violent prison and (2) assigned him to general population "despite knowledge that the penitentiary had a violent environment and a history of inmate assaults, and despite the knowledge that [Farmer], as a transsexual who 'projects feminine characteristics,' would be particularly vulnerable to sexual attack by . . . inmates." Id. at 831. Farmer claimed this amounted to deliberate indifference for his safety and a failure to protect him in violation of his Eighth Amendment rights. Id.

The district Court denied Farmer's motion for additional discovery and granted the prison officials' summary judgment motion

because Farmer had not notified the officials of his safety concerns. Id. at 831-32. The district court granted summary judgment because it found that "[t]he failure of prison officials to prevent inmate assaults violates the Eighth Amendment . . . only if prison officials were 'reckless in a criminal sense,' meaning that they had 'actual knowledge' of a potential danger." Id. at 831. Because Farmer "never expressed any concern for his safety to any" official, they "had no knowledge of any potential danger to [Farmer and] were not deliberately indifferent to his safety." Id. at 832 (internal quotations and citation omitted). The United States Supreme Court granted *certiorari* after the Seventh Circuit Court of Appeals summarily affirmed the district court's order without opinion. Id. The Court took the case because appellate courts had adopted inconsistent tests for "deliberate indifference." Id.

The Court began by reaffirming that an Eighth Amendment violation can lie for an official's failure to protect inmates from violence. "Prison conditions may be restrictive and even harsh, but gratuitously allowing the beating or rape of one prisoner by another serves no legitimate penological objective any more than it squares with evolving standards of decency. Being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society." Id. at 833-34 (internal quotations and citations omitted).

The Court then turned to whether a prison official must have actual knowledge of danger to an inmate (i.e., the subjective test) or whether it is sufficient that he failed to "act in the face of an unjustifiably high risk of harm that is either known or so obvious

that it should be know" (i.e., the objective test). Id. at 836-37. In adopting the more stringent subjective test, the Court held:

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Id. at 837. The Court thus held that the prison official must have actual knowledge of the safety risk. Importantly, "an official's failure to alleviate a significant risk that he should have perceived but did not . . . cannot under [Supreme Court precedent] be condemned as the infliction of punishment." Id. at 838 (emphasis added). Farmer thus mandated that Courts inquire into what each official's state of mind actually was, rather than dictate what his state of mind should have been. In other words, what did this official actually know?

As relevant to Plaintiff's case, the Court also discussed the role that "obviousness" of a risk plays in the above analysis. Although the Court held that the objective obviousness of a risk (i.e., the official knew or should have known of the risk) was not the proper measure of the deliberate indifference mental state, obviousness was nonetheless relevant evidence for whether a specific official subjectively knew of the risk. As the Court explained:

> Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious. . . . For example, if an Eighth Amendment plaintiff presents evidence showing that a substantial risk of inmate attacks was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been

> exposed to information concerning the risk and thus "must have known" about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk.

Id. at 842-43 (emphasis added; some quotations omitted). Also as relevant to the instant case, the Court further explained that prison officials cannot claim ignorance that a particular inmate would be attacked when that official has knowledge of the risk in general:

> Nor may a prison official escape liability for deliberate indifference by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault. The question under the Eighth Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial "risk of serious damage to his future health," and it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk. If, for example, prison officials were aware that inmate "rape was so common and uncontrolled that some potential victims dared not sleep [but] instead . . . would leave their beds and spend the night clinging to the bars nearest the guards' station," it would obviously be irrelevant to liability that the officials could not guess beforehand precisely who would attack whom.

Id. at 843 (citations omitted). However, a trier of fact does not have to conclusively accept that the obviousness of a risk automatically means the prison official is liable. The official may show that he was justifiably unaware of the obvious risk:

> Because, however, prison officials who lacked knowledge of a risk cannot be said to have inflicted punishment, it remains open to the officials to prove that they were unaware even of an obvious risk to inmate health or safety. That a trier of fact may infer knowledge from the obvious, in other words, does not mean that it must do so. Prison officials charged with deliberate indifference might show, for example, that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware

> of a danger, or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent.

Id.

Applying the above principles, the Supreme Court reversed the grant of summary judgment because the district court may have relied too heavily on Farmer's failure to warn anyone of the risks he faced in general population. Id. at 848. The Court reasoned:

> That [Farmer] "never expressed any concern for his safety to any of [the officials]," was the only evidence the District Court cited for its conclusion that there was no genuine dispute about respondents' assertion that they "had no knowledge of any potential danger to [Farmer.]" But with respect to each of [Farmer's] claims, for damages and for injunctive relief, the failure to give advance notice is not dispositive. [Farmer] may establish [the officials'] awareness by reliance on any relevant evidence.

Id. (citations omitted; citing to portion of the opinion regarding evidence of obviousness of a risk).

2. A Genuine Dispute of Material Fact Exists

Defendant argues that he is not liable because, *inter alia*, Plaintiff failed to express any fear or concern about walking in front of the general population inmates who sat on the bench next to the SNY holding cell. However, as Farmer teaches, an inmate's failure to warn a prison official does not exculpate the official if he ignored known dangers and placed the inmate at risk. The proper inquiry is whether Defendant subjectively knew of the risk that a general population inmate might attack an SNY inmate despite not being told of that danger.

Defendant does present some evidence that, based on his subjective belief, he did not believe the aforementioned danger existed. His most compelling fact is that five other SNY inmates walked the same path to the restroom that Plaintiff walked without

being attacked. Thus, because the two general population inmates had not attacked those inmates, he did not believe they would attack Plaintiff either. Plaintiff only rejoins that two, not five, inmates preceded him, but he does not dispute that other SNY inmates walked in front of the same two general population inmates, who attacked him, without incident.

For his part, Plaintiff presents some evidence, in the form of a declaration from fellow SNY inmate Michael Douglas Taylor, who avers that it is common knowledge among inmates and guards alike that general population inmates attack SNY inmates when they have the opportunity. (Doc. No. 38 at ¶¶ 5(h), 5(o).)[3/] Indeed, Taylor explains the "convict-code [sic]," which is a "standing-order [sic] to assault any SNY-Inmate [sic] 'on-site,' [sic] and that any general-population [sic] inmate who 'has the opportunity to assault a[n] SNY-Inmate [sic]' and 'doesn't take the opportunity,' is then to be assaulted." (Id. at ¶ 5(o).) Because of the dangers SNY inmates faced, Taylor explains, all guards were "abundantly aware" of the problem and the prison system had implemented special procedures to protect SNY inmates as they were escorted between different locations on prison grounds. (Id. at ¶ 5(r) (explaining that general population inmates were to either be cleared from the

---

[3/] Defendant objects to the late filing of this declaration. However, given that Plaintiff is representing himself and is currently in custody, the undersigned recommends that Taylor's declaration be accepted despite its slightly untimely filing. See Erickson v. Pardus, 551 U.S. 89, 94 (2007) ("A document filed pro se is 'to be liberally construed' . . . .") (per curiam) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)) (internal citations omitted); Corjasso v. Ayers, 278 F.3d 874, 878 (9th Cir. 2002) ("Pro se habeas petitioners may not be held to the same technical standards as litigants represented by counsel."); Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc) (explaining that courts "tolerate informalities from civil pro se litigants.").

area or compelled to sit on the ground until SNY inmates were secured).)

At first blush, Defendant's argument seems reasonable. After all, he had never met Plaintiff before and had no specific information about Plaintiff's safety concerns or the seated general population inmates' violence history. Plaintiff also did not express any concerns about his safety or about walking in front of the general population inmates. However, as explained above, the Supreme Court has expressly rejected Defendant's contention that Plaintiff should have alerted him of the danger. Moreover, Defendant never squarely addresses Plaintiff's most compelling argument, that the mere fact that he was an SNY inmate alerted Defendant of the risks attendant with walking him in close proximity to general population inmates. That argument, coupled with Taylor's declaration explaining the "convict code," present a genuine dispute of material fact. As explained below, the undersigned cannot conclude that Plaintiff has not presented any facts such that Defendant is entitled to judgment as a matter of law.

Plaintiff's argument is that the risks to his safety were obvious because everyone at the prison knew that general population inmates attack SNY inmates on sight. Thus, based on the obviousness of this risk, he did not have to tell Defendant of the risk because Defendant, along with everyone else, was well aware of it. Had Plaintiff been just another general population inmate, Defendant's purported lack of knowledge of the danger would have been much more reasonable and convincing. Indeed, in that situation and without more information, Defendant would have had no way of knowing that

two general population inmates would have attacked another general population inmate.

While the undersigned recognizes that Plaintiff made no effort to inform Defendant of his safety concerns, his SNY status by itself spoke volumes. SNY inmates are segregated from general population inmates because significant safety concerns require their segregation. This is not an insignificant point that should be as easily overlooked as Defendant does. The SNY population consists of gang drop-outs, child molesters, other sex offenders, and other inmates who are all at serious risk of death if housed in general population. Plaintiff alleges that this is no secret to any inmate or corrections officer at any California prison, RJD included. It is also no secret that there exists an informal standing rule that a general population inmate who encounters an SNY inmate must attack that inmate on sight.[4/] This is simply part of the prison culture, which the prison continuously strives to decipher, analyze, and learn. While it is inexplicable why the two inmates waited to attack Plaintiff, the fact remains that they did in fact attack Plaintiff in accordance with the standing rule. Plaintiff had never met or even seen his attackers, yet they attacked him without any provocation whatsoever or any knowledge about him except that he was an SNY inmate. The attackers' actions are certainly consistent with the existence of such a standing rule and bolsters why Plaintiff was SNY inmates must be kept separate from general population inmates in the first place. Plaintiff's *pro se* pleadings, read liberally, demonstrate that a genuine dispute of fact exists whether Defendant acted with deliberate indifference because he subjectively knew of

[4/] Defendant does not dispute that this informal standing rule exists.

the risks of walking an SNY inmate in front of two general population inmates. As Farmer teaches, whether Defendant had knowledge of the risk is a question of fact "subject to demonstration in the usual ways," which includes evidence of the obviousness of the risk. Farmer, 511 U.S. at 842. The "standing rule" is precisely that kind of evidence.

The foregoing notwithstanding, a rational trier of fact could, of course, give full weight to Defendant's argument that he did not subjectively believe Plaintiff was in danger because several SNY inmates preceded Plaintiff without incident and because he did not believe Plaintiff would be attacked in Defendant's presence. After all, Defendant was a uniformed correctional officer. However, this evidence is not so compelling, and the "standing rule" evidence is not so unbelievable or contradictory, that a trier of fact could only come to the conclusion that Defendant subjectively believed Plaintiff was safe.

Based on the foregoing, the undersigned cannot conclude that Defendant has presented evidence so compelling that reasonable minds could not differ whether he possessed the requisite mental state and displayed deliberate indifference toward Plaintiff's safety. Because a rational trier of fact could reasonably resolve this issue in favor of Plaintiff, Defendant is not entitled to summary judgment. See Blankenhorn v. City of Orange, 485 F.3d 463, 470 (9th Cir. 2007) ("If a rational trier of fact might resolve the issue in favor of the nonmoving party, summary judgment must be denied.") (alteration omitted).

B. Defendant is Not Entitled to Qualified Immunity

Defendant claims he is entitled to summary judgment because he is immune from suit. For the reasons that follow, the undersigned concludes that he is not entitled to qualified immunity.

In considering a claim for qualified immunity, the Court engages in a two-part inquiry: whether the facts shown "make out a violation of a constitutional right," and "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." Pearson v. Callahan, 129 S. Ct. 808, 815-16 (2009).

The undersigned first concludes that the facts in this case make out a violation of a constitutional right. It has long been established that prison officials have a duty to keep inmates safe, in particular to protect them from each other, and the failure to do so is a violation of the Eighth Amendment. Farmer, 511 U.S. at 832-33. As the United States Supreme Court wrote in 1994, "the lower courts have uniformly held, and as we have assumed, [that] 'prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners.'" Id. at 833 (citing cases; citation omitted). If Defendant disregarded the known risk that Plaintiff would be attacked, walked him in front of the unsecured general population inmates, exposed him to the known risk of attack, and Plaintiff was in fact attacked, Defendant unjustifiably failed to safeguard Plaintiff from attack, and an Eighth Amendment violation is made out.

The undersigned turns to whether the constitutional right that would be violated was clearly established. This is "a two-part inquiry: (1) Was the law governing the state official's conduct clearly established? (2) Under that law could a reasonable state

official have believed his conduct was lawful?" Browning v. Vernon, 44 F.3d 818, 822 (9th Cir. 1995). As previously explained, the United States Supreme Court, the final arbiter of all constitutional law questions, has long held that failure to safeguard an inmate's safety is a violation of the Eighth Amendment. See Farmer, 511 U.S. at 858 ("The opinion's clear message is that prison officials must fulfill their affirmative duty under the Constitution to prevent inmate assault . . . or otherwise face a serious risk of being held liable for damages . . . ."") (Blackmun, J., concurring). The right was clearly established.

Next, "assuming the facts in the injured party's favor," Estate of Ford, 301 F.3d 1043, 1045 (9th Cir. 2002), had Defendant known of the danger of walking an SNY inmate in close proximity to two unsecured general population inmates, no doubt exists that a reasonable officer would have known that Plaintiff was entitled to his safety and to be free from attack at the hands of other prisoners. Defendant's assertion to the contrary notwithstanding, it could not have been more clear to Defendant, or any reasonable officer, that failing to protect Plaintiff from attack in this situation was unlawful.[5/]

[5/] Defendant argues that the line between "some" risk and a "substantial" risk is unclear. However, if there exists a standing order that general population inmates are to assault SNY inmates on sight, lest they themselves be attacked, any reasonable officer would believe that the risk here did not straddle the fine line between "some" and "substantial," but rather, the risk was far on the side of "substantial." Otherwise, SNY inmates would not need to be kept in completely segregated housing in the first place. The instant case is distinguishable from Estate of Ford, 301 F.3d 1043 (9th Cir. 2002), which involved assigning two mentally ill inmates in the same cell, where one ended up killing the other. Ford involved two inmates who could have been assigned to the same cell, but where the judgment to place the two particular inmates in the same cell was misguided and unfortunate. However, the instant case involves inmates in classifications that should not have been in contact with each other to begin with.

III. CONCLUSION

Based on the foregoing, the undersigned RECOMMENDS that Defendant's Motion for Summary Judgment be DENIED.

This report and recommendation of the undersigned Magistrate Judge is submitted to the United States District Judge assigned to this case, pursuant to the provision of 28 U.S.C. Section 636(b)(1).

IT IS ORDERED that no later than February 11, 2011, any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties no later than March 11, 2011. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. Martinez v. Ylst, 951 F.2d 1153, 1156 (9th Cir. 1991).

DATED: January 28, 2011

Hon. William V. Gallo
U.S. Magistrate Judge